IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Regular Second Appeal No.366 of 2005
&
CMP(M) No.101 of 2006..

Date of decision:16.03.2006.

Pritam Singh ….**Appellant.**

Versus

Rattan Chand ….**Respondent.**

Coram

The Hon'ble Mr.Justice K C Sood,J.

Whether approved for reporting ?[1]

For the Appellant: **Mr.Ajay Kumar, Advocate.**

For the Respondent-5: **Mr.R.Kant Sharma, Advocate.**

K C SOOD,J.(Oral)

This second appeal arises out of the judgment and decree of the learned Additional District Judge, Una, dated 16th April, 2005.

It is admitted position that respondent No.6, Om Parkash, who is necessary party, expired when the proceedings were pending before the learned trial Court. The learned first appellate Court gave his judgment unmindful of the factum of the death of the respondent No.6, who was defendant No.6 before the trial Court. No steps were taken before the learned trial Court or the learned District Judge to substitute the legal representatives of defendant No.6.

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement?***

The impugned judgment and decree, evidently was passed in ignorance of the death of defendant No.6. The appellant in this appeal has filed this application under Order 22 Rules 4 and 9 of the Code of Civil Procedure read with Section 5 of the Limitation Act for the substitution of the legal representatives of deceased defendant No.6.

It is well settled that where a party dies pending suit or appeal, and judgment/decree is passed in ignorance to such death, the question of substitution of heirs and setting aside the abatement, if any, can only be considered by the court, before whom the suit or appeal as the case may be, was pending when defendant or respondent expired.

It hardly need any emphasis that appeal against dead person is nullity. The application filed by the appellant, in the circumstances, is not maintainable. This question has to be addressed before the learned trial Court.

In the facts and circumstances, the judgment and decree of the learned first appellate Court as well as the trial Court is set aside. The case is remitted back to the trial Court i.e. Sub Judge Ist Class, Court No.1, Una, with the direction that if an application is filed before that Court within three weeks from today for the substitution of the legal heirs of defendant No.6, he shall consider the question of abatement, after hearing the parties and

pass appropriate orders. Needless to say that such application shall be considered and decided at its own merits.

Order accordingly.

The parties are directed to appear before the learned trial Court on ***28th March, 2006.*** Records, if any, shall be sent to that court forthwith.

The appeal as well as this application shall stand disposed of, accordingly.

CMP No.642 of 2005.

In view of the order passed in the main appeal, this application does not survive. Interim order dated 21st July, 2005 shall stand vacated. The application is disposed of.

March 16, 2006 **(K C Sood)**
(aks) **Judge.**